



public interest
ADVOCACY CENTRE LTD

**A public interest approach to costs: preliminary submission to
the NSW Law Reform Commission inquiry into security for
costs and associated orders**

5 March 2010

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Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the (then) NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based, public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from Industry and Investment NSW for its work on energy and water, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

PIAC welcomes the opportunity to make a preliminary submission to the inquiry of the NSW Law Reform Commission (the Commission) into security for costs and associated orders (the Inquiry).

Current law on costs

The power of the courts in the NSW court hierarchy to make an order for costs is found in section 98 of the *Civil Procedure Act 2005* (NSW). That section states that costs are in the discretion of the court and the court has full power to determine by whom, to whom and to what extent costs are to be paid. The power is, however, subject to rules of court.

Rule 42.1 of the *Uniform Civil Procedure Rules 2005* (NSW) states that:

Subject to this Part, if the court makes any order as to costs, the court is to order that the costs follow the event unless it appears to the court that some other order should be made as to the whole or any part of the costs.

The Rule expresses the common law position that it is just and reasonable that the party who has caused the other party to incur the costs of litigation should reimburse that party for the liability incurred: see *Latoudis v Casey* [1990] HCA 59. The courts have been extremely reluctant to depart from the rule that 'costs follow the event' (the usual costs rule).

In *Oshlack v Richmond River Council* (1998) 193 CLR 72 (*Oshlack*), the High Court upheld the decision of Stein J who made no order as to costs on the grounds of public interest. However, the case has been said to hardly constitute an endorsement of Stein J's decision on the merits, and confirms the width of the discretion conferred upon a court in relation to costs.

In *Ruddock v Vadarlis* [2001] FCA 1865, Vadarlis and the Victorian Council for Civil Liberties sought orders in the nature of habeas corpus and mandamus to compel the release of a group of non-citizens on the *Tampa*. The Federal Court decided not to make an award of costs on the basis that the proceedings raised novel and important questions of law and that the applicants had no financial interest in the proceedings and were acting *pro bono*. Their honours stated that the matter was most unusual in that it involved the liberty of individuals who were unable to take action on their own behalf to determine their rights. The case illustrates that the awarding of costs is a matter of judicial discretion and that public interest is only one factor in the exercise of the discretion.

The Land and Environment Court

The *Land and Environment Court Rules 2007* (NSW) provide:

4.2 Proceedings brought in the public interest

- (1) The Court may decide not to make an order for the payment of costs against an unsuccessful applicant in any proceedings if it is satisfied that the proceedings have been brought in the public interest.
- (2) The Court may decide not to make an order requiring an applicant in any proceedings to give security for the respondent's costs if it is satisfied that the proceedings have been brought in the public interest.
- (3) In any proceedings on an application for an interlocutory injunction or interlocutory order, the Court may decide not to require the applicant to give any undertaking as to damages in relation to:
 - (a) the injunction or order sought by the applicant, or
 - (b) an undertaking offered by the respondent in response to the application,

if it is satisfied that the proceedings have been brought in the public interest.

Even in cases determined to be in the public interest, the Land and Environment Court has been reticent to depart from the usual costs rule and has determined that 'in most cases one would expect it would also be necessary to establish special circumstances additional to the public interest in order to enliven the discretion [contained in Rule 4.2]'.¹

Costs capping

PIAC draws the Commission's attention to Order 62A rule 1 of the *Federal Court Rules* (Cth). Order 62A provides that the Court may, by order made at a directions hearing, specify the maximum costs that can be recovered on a party-and-party basis. An Order 62A costs order has the benefit of removing uncertainty about the level of risk of an adverse costs order in terms the quantum of risk from the applicant's shoulders, thereby allowing them to proceed in cases where they otherwise would not feel able to do so.

Order 62A limits rather than removes the risk of adverse costs.

In June 2008, in proceedings against Virgin Blue, PIAC, acting on behalf of two people with disability, succeeded in obtaining costs caps in the two sets of proceedings being heard together in the Federal Court. The two applicants alleged that Virgin Blue has discriminated against them by requiring that they travel with a carer at their own expense because of their disability. Bennett J capped the amount of costs the two applicants would be required to pay if they are unsuccessful in their claim against Virgin Blue at \$35,000 and \$15,000 respectively. This was the first time that cost capping under Order 62A has been ordered in a human rights case and it enabled PIAC's clients to proceed with their claims. In making her decision, Bennett J weighed the 'entitlement' of Virgin Blue to recover its costs if it was successful with a number of factors including: that the applicants did not stand to gain any personal financial benefit; that the matter was one that was in the public interest; and, that the applicants would be inhibited from proceeding with their claims if the Court did not make the order.²

In NSW, a similar provision is contained in Rule 42.4 of the *Uniform Civil Procedure Rules 2005* (NSW).

The problem with the federal and NSW costs-capping provisions are twofold. Firstly, there is the problem of the infrequent use of the cost-capping provisions because of lack of awareness by practitioners and judges. Second, in cases where applications have been made, judges have been reluctant to make orders limiting costs. Both problems could be addressed by way of a presumption in favour of costs-limiting orders in appropriate cases, and/or by way of guidance to judges in exercising their costs discretion.

In relation to public interest proceedings, PIAC submits that costs-capping provisions should be strengthened as part of a new rule dealing with public interest costs orders.

Existing costs-capping provisions should also remain, and also be strengthened, to cover proceedings that are not considered public interest.

¹ *Anderson on behalf of Numbahjing Clan within the Bundjalung Nation v Director-General of the Department of Environment and Climate Change* [2008] NSWLEC 299, 300.

² *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864.

Public interest costs orders

PIAC is concerned that the usual costs rule prevents disadvantaged members of the community from pursuing meritorious claims and thus is a significant barrier to access to justice. As the Victorian Environmental Defenders Office submitted to the Victorian Law Reform Commission's recent Civil Justice Review:

The threat of adverse costs is a crude exclusion device the burden of which falls disproportionately on individuals and community groups which do not have the same deep pockets as governments and corporations.³

PIAC submits that costs rules should not inappropriately impede access to the courts and a reconsideration of the principles underpinning costs awards is therefore necessary to facilitate access to justice.

Particular consideration should be given to reforming the costs principles and rules in public interest cases. Public interest litigation assists the development of the law and provides a significant benefit to the community. Often, public interest litigants do not stand to gain financially from pursuing public interest litigation, yet they risk significant economic consequences if their claim is unsuccessful. Their matters are often hard fought and therefore potentially more expensive because respondents may identify the systemic impact of an adverse outcome. For these reasons, public interest litigation is often stymied and reform and structural change thwarted. In PIAC's experience, a large percentage of potential public interest litigation does not proceed due to the risk of adverse costs.

The Victorian Law Reform Commission (VLRC), in its recent *Civil Justice Review*, recommended: 'There should be express provision for courts to make orders protecting public interest litigants from adverse costs in appropriate cases, including orders made at the outset of litigation.'⁴

In 1995, the Australian Law Reform Commission (ALRC) recommended retaining the principle that costs follow the event, but noted that there should be exceptions to the general application of this rule in public interest cases.⁵

The ALRC stated that 'public interest litigation is of significant benefit to the community and that it should not be impeded by the costs allocation rules'.⁶ The ALRC report proposed that courts be given a broad discretion to grant public interest costs orders in respect of proceedings that:

- will determine, enforce or clarify an important right or obligation affecting a significant sector of the community;

³ Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008) 675.

⁴ Ibid.

⁵ Australian Law Reform Commission, *Cost Shifting – Who Pays for Litigation*, Report No 75 (1995) [13.19].

⁶ Ibid [13.1].

- involve the resolution of an important question of law and may reduce the need for further litigation; or
- otherwise have the character of public interest or test case proceedings.⁷

The ALRC recommended that a court or tribunal may make a public interest costs order notwithstanding that one or more of the parties to the proceeding has a personal interest in the matter.⁸ This reflects the common law position, though courts have tended to view a litigant’s personal interest as being a factor weighing in favour of the usual costs rule⁹. The VLRC was also of the view that the fact that a litigant may have a personal interest in the outcome of the proceedings should not preclude the court from determining that the proceedings are in the public interest.¹⁰

The ALRC suggested that courts be empowered to make these orders at any stage in the proceedings, and noted that although courts already have the power to depart from the rule that costs follow the event, they rarely exercise that power.

PIAC supports these recommendations and submits that the current costs rule in NSW should be reformed so that public interest costs orders are available to litigants in public interest matters. PIAC is keen to develop this proposal and make further submissions about it as the Commission’s inquiry progresses.

One factor that requires further consideration is whether a ‘statute-specific’ approach, involving the incorporation of special costs regimes into particular statutes governing the exercise of particular jurisdictions, would be beneficial. Another factor, discussed briefly below, is whether lawmakers should create a definition of public interest, or leave that issue to the courts.

PIAC considers that consideration should be given to making the new costs rule provide a presumption in favour of no order for costs in public interest matters.

Defining the ‘public interest’

Proposals for public interest costs orders and for improving the application of costs-capping provisions in public interest proceedings need to examine what definition(s) of ‘public interest’ should be adopted. PIAC submits that ‘public interest’ should be defined broadly to include all cases that could benefit a class of disadvantaged people, clarify a law that has an impact on a significant sector of the community or effect the interpretation of fundamental human rights, even though they may benefit the applicant as well. PIAC considers the ALRC’s proposal regarding the criteria for the granting of public interest costs orders (discussed above) to be helpful.

PIAC submits that any new costs rule should be contained in legislation. This legislation should have an objects clause that clearly states its intention to assist the initiation and conduct of litigation that affects the

⁷ Ibid [13.19].

⁸ Ibid.

⁹ *Minns v State of NSW (No.2)* [2002] FMCA 197 [13].

¹⁰ Victorian Law Reform Commission, above n 3, 676.

community or a significant section of the community or that will develop the law, as recommended by the ALRC.¹¹

In *Oshlack*, Kirby J suggested that the provisions dealing with the standing to bring proceedings are a consideration in determining costs orders. He expressed concern that Parliament's conferral of open standing to promote the public interest would be rendered worthless if unsupported by a departure from the usual costs rule. More recent decisions have not adopted this approach.¹² PIAC considers that open standing should be a relevant factor that weighs in favour of the granting of a public interest costs order, but the absence of open standing should not be a bar to the granting of such an order.

PIAC submits that the Commission should look to existing case law, as well as to definitions adopted in overseas jurisdictions, to assist in developing a rule that will make a significant impact in alleviating the costs burden and risk to applicants in public interest matters. PIAC seeks to make further submissions about the question of how public interest should be defined, and what factors should be taken into account in any new rule as the Commission's inquiry progresses.

Terms of a public interest costs order

The ALRC recommended that courts or tribunals could make such public interest costs orders as they considered appropriate having regard to:

- the resources of each party (including whether the financial capacity of any party to meet an adverse costs order is being affected in whole or in part by legal aid, contingency fees, insurance, fighting funds, tax deductibility or any other factor);
- the likely cost of the proceedings to each party;
- the ability of each party to present their case properly or negotiate a fair settlement; and
- the extent of any private or commercial interest each party may have in the litigation.

It recommended that a court or tribunal could make orders including that costs follow the event; each party bear their own costs; the applicant not be liable for the other party's costs; the applicant be liable only for some costs or be able to recover their costs from the other party; or a third party pay all or part of the costs of one or more of the parties.¹³

PIAC agrees with these recommendations.

Timing of a public interest costs order

Public interest costs orders are likely to be of greatest benefit to public interest litigants if they are made at the earliest possible stage of the proceedings. The later an order is applied for and made, the higher an applicant's liability for costs incurred before the order was granted. Undue delay or reluctance by judges to

¹¹ Australian Law Reform Commission, above n 5, [13.21].

¹² *Save the Ridge Inc v Commonwealth* [2006] FCAFC 51 [17]-[19]; *The Wilderness Society v Minister for the Environment and Water Resources* [2007] FCA 1863 [31].

¹³ Australian Law Reform Commission, above n 5, [13.25].

make early orders could render any new public interest costs rule useless. Therefore, PIAC considers that the new costs rule should specifically facilitate the granting of orders at the outset of litigation. This also benefits respondents who can then better appreciate their financial risk in relation to the proceedings and may have the benefit of encouraging the parties to narrow the matters in dispute at an early stage. It may also have the benefit of encouraging litigants to ask the court to consider the court appointment of experts, as is permitted for example under Rule 31.46 of the *Uniform Civil Procedure Rules 2005* (NSW), as a means to reduce the parties' costs of litigation.

However, if the applicant proceeds without applying for such an order initially, and then seeks to apply, this should also be possible. This may occur in cases where, for example, the public interest in a matter only becomes apparent some way into the proceedings or the applicant obtains legal representation after the commencement of proceedings.

PIAC's position is in line with the ALRC's recommendation 49.¹⁴

An indemnity fund

An alternative method of addressing the impact of adverse costs on public interest litigation would be to establish a fund that could partially or wholly indemnify applicants in appropriate cases. This would have the effect of alleviating barriers faced by applicants in civil matters who have limited means or are financially vulnerable, while reducing the impact of alternative reforms on respondents. That is, public interest costs orders mean respondents cannot recover part or all of their costs, whereas the implementation of an indemnity fund mean such costs are paid from the fund.

While not strictly within the terms of reference of the Inquiry, PIAC considers it would be valuable for the NSW Law Reform Commission to consider the issue of an indemnity fund given its potential impact on costs issues.

The VLRC recommended that a new funding body be established to provide financial assistance to parties with meritorious civil claims and an indemnity for any adverse costs order or security for costs order made against a party assisted by the fund. This approach reflects the current indemnity available to recipients of grants of legal aid in NSW under section 47 of the *Legal Aid Commission Act 1979* (NSW).¹⁵ The VLRC made various recommendations in relation to making the fund self-funding.¹⁶ PIAC considers that such a fund could make a substantial contribution to access to justice in NSW.

¹⁴ Ibid [13.27].

¹⁵ *Legal Aid Commission Act 1979* (NSW) s 47 provides an indemnity for legal aid grant recipients in matters in courts and tribunals. While the indemnity operates to protect a recipient against the full amount of any adverse cost order made by a NSW court or tribunal, it provides only a limited indemnity in respect of matters in federal courts or tribunals: *Minns v State of NSW (No.2)* [2002] FMCA 197. In federal proceedings Legal Aid NSW will indemnify a legal aid grant recipient for the first \$15,000 of any adverse costs order, with the recipient being liable for any amount over that \$15,000.

¹⁶ Victorian Law Reform Commission, above n 3, 622.

An important element of such a fund is that decisions about whether or not to provide financial assistance and/or an indemnity must be made prior to or early in the proceedings to ensure that applicants know the risk or otherwise that they face. There are several litigation funds available, for example the Commonwealth Public Interest and Test Case Scheme that do not necessarily determine applications quickly and this can mean that applicants are unable to proceed because they are waiting on a decision. While this may not have a detrimental effect in all proceedings, statutory time limits on commencing proceedings can mean that applicants must make a decision on whether or not to take the risk of litigation without having a decision on the availability of funding.

An alternative approach would be to initially limit the fund to public interest proceedings. If successful, the fund could then be extended to include all meritorious civil matters.

Security for costs

Currently in NSW rules relating to security for costs are contained in the *Uniform Civil Procedure Rules 1995* (NSW), Rule 42.21. A court may order the plaintiff to give security for the defendant's costs where a plaintiff resides outside of NSW; there is reason to believe that a misstatement of address on the originating process was made with intention to deceive; a plaintiff has changed their address with the intention of avoiding the consequences of the proceedings; there is reason to believe that the plaintiff, being a corporation, will be unable to pay the costs of the defendant if ordered to do so; or that a plaintiff is suing not for his or her own benefit, but for the benefit of some other person and there is reason to believe that the plaintiff will be unable to pay the costs of the defendant if ordered to do so.

Courts also has an inherent or implied power to make an order for security for costs. This power is unfettered and is not restricted or excluded by rules made on the subject for the purpose of regulating the practice and procedure of the court: *Rajski v Computer Manufacture and Design Pty Ltd* [1982] 2 NSWLR 443; affirmed on appeal: [1983] 2 NSWLR 122.

Although a court's inherent or implied power to order security for costs is unfettered and the statutory power to order security for costs 'is not to be narrowly construed'¹⁷, courts have identified the kind of factors to be taken into account in the exercise of the discretion. Those factors are conveniently set out by Beazley J in *KP Cable Investments Pty Ltd v Meltglow Pty Ltd* (1995) 56 FCR 189 at 197-198:

- (i) whether the application for security has been brought in a timely fashion;
- (ii) the strength and bona fides of the case;
- (ii) whether the poor financial situation of the applicant results from the respondent's conduct;
- (iv) whether the application for security is oppressive, in the sense of denying of an person without means or organisation a right to litigate;
- (v) whether there is anyone supporting the applicant who is likely to benefit and be willing to provide the security;

- (vi) whether there is anyone supporting the applicant who has offered a personal undertaking to be liable for the costs and if so, the form of any such undertaking; and
- (vii) whether the applicant for security is in substance a plaintiff or the proceedings are defensive in nature.

PIAC submits that individuals of limited means should not be denied the right to litigate, as envisaged by Beazley J above. If security for costs were available in matters based solely or even substantially on the impecuniosity of individual plaintiffs, a substantial portion of the community would be unable to litigate to enforce their rights, and access to justice in Australia would be significantly limited. Thus notions of fairness and the right to be heard should be relevant to consideration of applications for security for costs. Issues of fairness have been considered in cases before the European Human Rights Commission in relation to security for costs. In *Ait Mouhoub v France* [1998] ECHR 97, the requirement to pay 80,000 francs as security for costs was held to be a disproportionate obstacle to access to the court.

The power to order security for costs against an organisation is designed to prevent individual plaintiffs with assets from hiding behind the structure of a corporation without assets. As explained by Connolly J (Campbell CJ and Demack J agreeing) in *Harpur v Ariadne Australia Ltd (No 2)* [1984] 2 Qd R 523 at 532:

The mischief at which the provision is aimed is obvious. An individual who conducts his business affairs by medium of a corporation without assets would otherwise be in a position to expose his opponent to a massive bill of costs without hazarding his own assets. The purpose of an order for security is to require him, if not to come out from behind the skirts of the company, at least to bring his own assets into play. If however he is already available for whatever he is worth, the object of the legislation is seen to be satisfied.

PIAC agrees that individuals should not be able to hide behind organisations without assets. It would appear that the rules and discretion reserved by the common law provide adequate protection for defendants in this regard.

¹⁷ *Melville v Craig Nowlan & Associates Pty Ltd* (2001) 54 NSWLR 82 at [104] and [108].